

EXHIBIT A

244
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE
CORDIS CORPORATION,) Volume II
Plaintiff,)
v.) No. 97-550-SLR
MEDTRONIC VASCULAR,)
INC., BOSTON)
SCIENTIFIC CORP., and)
SCIMED LIFE SYSTEMS,)
INC.,)
Defendants.)
MEDTRONIC VASCULAR, INC.,)
v.) No. 97-700-SLR
CORDIS CORPORATION, et al.)
Defendant.)
Monday, March 7, 2005
9:30 a.m.
844 King Street
Wilmington, Delaware
BEFORE: THE HONORABLE SUE L. ROBINSON
United States District Court Judge
245
APPEARANCES:
ASHBY & GEDDES
BY: STEVEN J. BALICK, ESQ.
-and-
PATTERSON, BELKNAP, WEBB & TYLER, LLP
BY: GREGORY L. DISKANT, ESQ.
BY: EUGENE GELERENTER, ESQ.
BY: WILLIAM F. CAVANAUGH, JR., ESQ.
BY: MICHAEL J. TIMMONS, ESQ.
BY: ERIC HARRIS, ESQ.
BY: SCOTT HOWARD, ESQ.
Counsel for the Plaintiff

MORRIS, NICHOLS, ARSHT & TUNNELL
BY: KAREN JACOBS LOUDEN, ESQ.

-and-

McDERMOTT, WILL & EMERY, LLP
BY: MICHAEL UNDERHILL, ESQ.
BY: DONNA M. TANGUAY, ESQ.
BY: JAMES G. RIZZO, ESQ.
BY: RAYMOND LUPO, ESQ.
BY: MARK G. DAVIS, ESQ.

Counsel for Defendant

246

[1] THE CLERK: All rise. Please be [2] seated.

[3] THE COURT: I understand that's [4] one issue for this morning. This needs to be [5] addressed.

[6] MR. DAVIS: Your Honor, during the [7] cross-examination of Dr. Fischell depending on [8] what areas that Cordis gets into, it's possible [9] that the issue of product-to-product comparison [10] may come up if they talk about the commercial [11] success of the Palmaz-Schatz stent.

[12] THE COURT: All right. Well, I do [13] have my answer for that. I don't have a time [14] for a lot of debate, so I'll give you my [15] reflections.

[16] MR. DAVIS: Certainly.

[17] THE COURT: I've gone over the [18] Federal Circuit opinion and I've gone over the [19] materials. It seems to me that the Federal [20] Circuit has held by

reversing my claim [21] construction by the language it used that wire [22] stents can fall under the rubric of this claim [23] construction.

[24] Therefore, it is my opinion that

Page 247

[1] product-to-product comparisons in this context [2] would be so confusing and prejudicial that I [3] cannot let them in.

[4] Because sharp edges are not, [5] that's an added claim limitation here. And by [6] saying that our products differ from the [7] Palmaz-Schatz because we do not have sharp edges [8] and our products are better because of that, [9] sharp edges are not part of the claim [10] construction here. And so I will not allow it [11] on cross.

[12] MR. DAVIS: Thank you, Your Honor.

[13] THE COURT: All right.

[14] MR. RIZZO: Your Honor, good [15] morning.

[16] THE COURT: Yes.

[17] MR. RIZZO: Quickly with regards [18] to certain exhibits that Cordis would like to [19] use with Dr. Fischell, Medtronic had objected to [20] Document Numbers PX 18, PX 227, and PX 228, [21] primarily hearsay grounds. But pointed out to [22] counsel for Cordis that to the extent they [23] wanted to to use these documents, which where [24] articles from the New England Journal of

Page 248

[1] Medicine under Federal Rule of Evidence 803(18), [2] such learned treatises or medical periodicals [3] such as these articles should be read into [4] evidence but not be received in as exhibits.

[5] There are also some documents that [6] were not included in their production the other [7] night. And we have not seen them. We believe [8] that probably demonstratives. They are PX 2940, [9] PX 2958, PX 3262, PX 3789A and PX 3789C.

[10] MR. CAVANAUGH: I think I can make [11] life easier on the first one, Your Honor. With [12] respect to the three publications, I think [13] that's subject — we can fight about at a later [14] date. We're not going to be using any of these [15] with this witness.

[16] The list of other exhibits that [17] Mr. Rizzo read off as being objected to, this is [18] the first that we've heard about these [19] objections. And I believe counsel's [20] understanding is that we'd be notified of [21] objections the night before, at least the night [22] before. We didn't get any notice of that. Some [23] of these exhibits were previously admitted in [24] the last trial. They include actual product to

Page 249

[1] natural samples to stents.

[2] And frankly, the list that Mr. [3] Rizzo went so fast without him giving us prior [4] notice of that, I don't know what else is on the [5] list. But I would have appreciated learning it [6] the night before, instead of coming into Court.

[7] THE COURT: All right. So [8] Mr. Rizzo, I obviously don't know what these [9] documents or things are.

[10] What is this evidence that you're [11] objecting to?

[12] MR. RIZZO: Your Honor, excuse me. [13] Your Honor, there is a joint pretrial order in [14] effect. We raised our objections timely. We [15] raised —

[16] THE COURT: You know, I'm just [17] asking you what they are so we can resolve this.

[18] MR. RIZZO: Your Honor, I don't [19] know why they were not included in their [20] production. I don't know what it is that we [21] should be objecting to. We put in our [22] correspondence that we will reserve our right to [23] object upon receipt of the same.

[24] So I don't know how we could have

Page 250

[1] anticipated —

[2] THE COURT: Slowly identify what [3] the exhibit number is.

[4] MR. RIZZO: One moment, please, [5] Your Honor.

[6] THE COURT: Thank you.

[7] MR. RIZZO: Copies of PX 2940. PX [8] 2958.

[9] THE COURT: Wait. 2940. 2958.

[10] MR. RIZZO: 3262.

[11] THE COURT: 3262.

[12] MR. RIZZO: 3789A.

[13] THE COURT: 3789A.

[14] MR. RIZZO: And 3789C.

[15] THE COURT: 3789C. And when you [16] say they were not included in Cordis' [17] production, which production are you talking [18] about?

[19] MR. RIZZO: We're talking about [20] the production of exhibits which Cordis provided [21] to us the other night inconsistent with the PTO.

[22] THE COURT: Their responsibility [23] to give you exhibits forty-eight hours before?

[24] MR. RIZZO: Correct.

Page 251

[1] THE COURT: Okay. Thank you very [2] much. Now, let's see what these are and if [3] there really is an objection.

[4] MR. CAVANAUGH: Let me sort my way [5] through my list. 2940, Your

[22] on November 27, 2000?

[23] A: Well, again, you asked me then the [24] same way you're asking me now, and I didn't

Page 405

[1] catch the twist of the question. I don't know [2] what I answered about that.

[3] I came up with it, the placing [4] slots on metal tubes way before I met [5] Mr. Schultz, regardless of what I said here, the [6] way it was interpreted, the way the question was [7] asked.

[8] Q: Let me make sure I understand what [9] the twist in the question was, if I could.

[10] A: Okay.

[11] Q: The question was "And your first [12] idea about how you might make the slotted tube [13] as opposed to expanded metal, they came from Dr. [14] Schultz when you went to talk to him; right?"

[15] A: That the problem, I was thinking [16] about — I didn't listen to the question as I [17] sometimes did correctly. You were asking me [18] specifically if Mr. Schultz had taught me that [19] in order to make a better expandable stent, I [20] had to make slots in the tube, which was not the [21] case.

[22] I was thinking that you were [23] asking me how to make — how the slots could be [24] made on the balloon, on the stent good.

Page 406

[1] Q: But you agree with me that that's [2] not my question, correct?

[3] A: That's what it says there. That's [4] in the record.

[5] Q: And you were under oath, correct?

[6] A: I was under oath, yes.

[7] Q: And you were trying your best to [8] answer truthfully, is that true?

[9] A: As always, yes.

[10] Q: Okay. Now, you don't claim that [11] any ideas that Dr. Schultz gave to you are part [12] of your invention, do you?

[13] A: All the ideas that Mr. Schultz [14] gave me about how to make the stent, no, they [15] were not part of the invention.

[16] Q: Let's take a look, if we could, at [17] Page 6 of your 1983 monograph, and this is at [18] page, or I'm sorry, it's Exhibit 3573.

[19] So I believe we're back to Volume [20] 1.

[21] A: Can you please tell me the [22] exhibit? Number.

[23] Q: Which one, sir?

[24] A: The exhibit number.

Page 407

[1] Q: Yes, sir. It's 3573.

[2] A: Okay.

[3] Q: And this is a paper that you wrote [4] in 1983; correct?

[5] A: That's correct.

[6] Q: Could we have it up on the screen, [7] please. And I would like to direct you, if I [8] could, to page six —

[9] MR. UNDERHILL: I apologize, may I [10] move it into evidence first?

[11] MR. HOWARD: No objection, Your [12] Honor.

[13] MR. UNDERHILL: Thank you. Now, [14] may I have it on the screen, please.

[15] Could we go to page six? And I'm [16] interested in the second paragraph.

[17] BY MR. UNDERHILL:

[18] Q: And I hope not to have to spend a [19] lot of time on this, Dr. Palmaz, but my question [20] here on this paragraph, is in this paragraph you [21] describe the bars of the slotted tube stent as [22] twisting when the stent is expanded; correct?

[23] A: Yes, that's correct.

[24] Q: And so what we're talking about

Page 408

[1] when we talk about the stent members twisting, [2] we're talking about this part right here [3] twisting and turning out of the plane; is that [4] correct?

[5] A: That's correct.

[6] Q: When it's expanded. So then you [7] get a projecting edge when it turns; is that [8] correct?

[9] A: That's correct.

[10] Q: And as a result of that, that [11] twisting that we were just talking about, the [12] effective wall thickness of the stent will [13] increase as a result; is that correct?

[14] A: After balloon expansion, yes.

[15] Q: When it twists out of plane, and [16] you have the projecting edges?

[17] A: Yes.

[18] Q: Okay. Thank you. [19] Now, at the time you wrote the [20] monograph, you were aware it did this, because [21] you had looked at expanded metal; correct?

[22] A: No, actually that observation came [23] from my cardboard models. I made — since I [24] couldn't manufacture this in my house, I made

Page 409

[1] large cardboard models, and then I cut out the [2] slots with scissors.

[3] I would tape them together with [4] Scotch tape, and I would put my hands inside [5] simulating a balloon, and I would pull them out.

[6] And I noticed that the ribbons in [7] between the slots actually tended to

twist. And [8] since I didn't have the ability to do that with [9] the real thing which would be, you know, dead [10] soft soluble metal, then the assumption was this [11] thing was going to behave like this once it [12] became a real medical device.

[13] That was my assumption when I [14] wrote this monograph after my visit with [15] Mr. Schultz.

[16] Q: So it wasn't based on your [17] observations of expanded metal, is that correct?

[18] A: No.

[19] Q: Let's look at your prior [20] testimony, if we could. Let's go back to Volume [21] 2, please, and let's look at February 9, 2001, [22] if you don't mind, please.

[23] A: What's the exhibit number?

[24] Q: It's February 9, 2001. Oh,

Page 410

[1] Exhibit 2.

[2] A: I'm sorry —

[3] Q: Volume 2. Volume 2.

[4] A: Volume 2?.

[5] Q: Yes.

[6] A: And the number?

[7] Q: Page number, sir, is 646, Line 13.

[8] A: You know the tabs are indicated by [9] TT and then a date.

[10] Q: I beg your pardon, sir, [11] Sir, may I ask my colleague to [12] come up and assist? Would that help —

[13] A: Yes.

[14] Q: Thank you.

[15] A: — to save time?

[16] MR. UNDERHILL: Jim, I think I [17] gave the wrong page number. Instead of 614, [18] it's 646.

[19] BY MR. UNDERHILL:

[20] Q: 646, beginning at Line 13, and [21] actually the person asking questions here is [22] Mr. Cavanaugh, who is Mr. Diskant's partner.

[23] Mr. Cavanaugh is here in court [24] today?

Page 411

[1] A: Yes.

[2] Q: And Mr. Cavanaugh is doing the [3] question?

[4] A: Yes.

[5] Q: And he's Cordis' attorney?

[6] A: Yes.

[7] Q: And let me read this to you. The [8] Cordis lawyer asked you: We're looking at the [9] same passage here, and the question is:

[10] "Question: You write there" — [11] could we go back to the language on the —